



Office of the Attorney General  
State of Texas

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ATTORNEY GENERAL

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Mr. Glen A. Grunberger  
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Texas Natural Resource Conservation Commission  
P.O. Box 13087  
Austin, Texas 78711-3087

OR94-721

Dear Mr. Grunberger:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, Government Code chapter 552. We assigned your request ID# 23154.

The Texas Natural Resource Conservation Commission ("TNRCC") has received a request for information about Gibraltar Chemical Resources, Inc. ("Gibraltar"). Specifically, the requestor seeks:

Documents entitled "Gibraltar Chemical Resources, Inc. Standard Operating Procedures, September, 1993" and "Revisions to Gibraltar Chemical Resources, Inc. Standard Operating Procedures, September 1993, as of October 1, 1993."

You have submitted the requested information to us for review and claim that section 552.110 of the Government Code exempts it from required public disclosure.

As a threshold issue, we consider whether the requested documents are subject to the Open Records Act. You argue that the requested documents are not subject to the Open Records Act because "the specific documents requested, by name, are not kept by the TNRCC" and that "TNRCC staff are routinely destroying the Gibraltar standard operating procedures and process flow charts documents when they are no longer needed." You thus contend that the requested documents do not constitute "public information" because they are "not maintained in permanent files."

We disagree. Section 552.021 of the Government Code provides in pertinent part:

(a) Information is public information if, under a law or ordinance or *in connection with the transaction of official business*, it is collected, assembled, or maintained:

(1) by a governmental body; or

(2) for a governmental body and the governmental body owns the information or has a right of access to it.

Gov't Code § 552.021 (emphasis added). It is immaterial under the Open Records Act whether an official who holds records regarding official business has discretion to generate or maintain the records. *Cf.* Attorney General Opinion JM-1143 (1990) at 2; Open Records Decision No. 142 (1976) at 1-2.

You advise us that Gibraltar submitted the requested information to TNRCC pursuant to an emergency order. We understand that the emergency order was issued pursuant to section 361.301 of the Health and Safety Code and section 305.29, title 30, of the Texas Administrative Code, which authorize TNRCC to issue emergency orders concerning an activity of solid waste management under its jurisdiction if TNRCC determines that an emergency requiring immediate action to protect the public health and safety or the environment exists. Clearly, TNRCC collected the requested documents "*in connection with the transaction of official business.*" Accordingly, we conclude that the requested information is "public information" within the meaning of section 552.021(a) of the Government Code and therefore subject to the Open Records Act.<sup>1</sup>

Having concluded that the requested documents are subject to the Open Records Act, we now consider whether TNRCC may withhold them under section 552.110 of the Government Code. Pursuant to section 552.305 of the Government Code, we have notified the party whose proprietary interests are implicated by this request. We have received a response from Gibraltar. Gibraltar claims that section 552.110 of the Government Code excepts the requested information from required public disclosure.

Section 552.110 protects the property interests of private persons by excepting from required public disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or

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<sup>1</sup>You advise us that TNRCC is in the process of destroying the requested documents. We note that the Open Records Act applies only to information in existence. *See* Open Records Decision Nos. 572 (1990) at 1; 458 (1987) at 2. We caution, however, that a governmental body must honor a request for information before destroying records subject to the request. *See generally* Open Records Decision No. 505 (1988) (ballots subject to open records request must be made available, even though statute authorizes their destruction).

confidential by statute or judicial decision. Gibraltar claims that the requested information constitutes trade secrets.

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 (1990) at 2. Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. *It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business . . . .* A trade secret is *a process or device for continuous use in the operation of the business. . . .* [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939) (emphasis added). If a governmental body takes no position with regard to the application of the "trade secrets" branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5.<sup>2</sup>

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<sup>2</sup>The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are

(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2, 306 at 2 (1982); 255 (1980) at 2.

We have examined the arguments submitted to us for review. We conclude that Gibraltar has made a prima facie case that the requested information constitutes trade secrets. Moreover, no one has submitted an argument that rebuts Gibraltar's claim as a matter of law. Accordingly, we conclude that TNRCC must withhold the requested information under section 552.110 of the Government Code.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,



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Open Government Section

LRD/GCK/rho

Enclosures: Submitted documents

Ref: ID# 23154

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